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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. ~~468~~ 71 - 468

UNITED AIR LINES, INC.,
Petitioner,

vs.

MARY BURKE SPROGIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Decree of the District Court for the Northern District of Illinois (Petition, pp. A3-A11) are reported at 308 F. Supp. 959. The opinion of the Court of Appeals for the Seventh Circuit (Petition, pp. A12-A35)[1] is reported at 444 F. 2d 1194.

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1. References to the Court of Appeals opinion as reprinted in the appendix to the petition shall be "C. A., p. ....". Similarly the Findings and Decree of the District Court shall be referred to as "D. C., p. ....".

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

1. (a) Whether Petitioner's policy of discharging female flight cabin attendants when they marry, without similarly discharging any male employees, including male flight cabin attendants, under identical circumstances, is a discrimination in employment based on sex prohibited by Section 703(a)(1) of the Civil Rights Act of 1964?

(b) If the foregoing prohibition on marriage of female flight cabin attendants is discriminatory, can Petitioner's requirement of single marital status for female cabin attendants be justified as a bona fide occupational qualification under Section 703(e)(1) of the Act?

2. Did the lower courts correctly rule that neither the form nor the content of a statement from the Equal Employment Opportunity Commission to a third party could support Petitioner's alleged defense of good faith reliance under Section 713(b) of the Act?

3. Did the lower courts correctly interpret "intentionally" in Section 706(g) of the Act to mean intent to commit the discriminatory practice?

4. Do the equitable powers granted by Section 706(g) of the Act permit the District Court to retain jurisdiction to hear evidence and legal argument as to whether the scope of relief should include other stewardesses discharged pursuant to Petitioner's illegal policy?

STATUTES INVOLVED.

Pertinent provisions of Title VII of the Civil Rights Act of 1964 (42 U. S. C. §§ 2000e-1, *et seq.*) and the Federal Rules of Civil Procedure are adequately set forth in the petition.

STATEMENT OF THE CASE.

On June 19, 1966 United discharged Mary Burke Sprogis from her employment as a flight cabin attendant or stewardess solely because she had become married (App. 9, 21-22).[2] At that time United maintained a policy of discharging stewardesses upon marriage. United admits that it employs both female and male employees, including male flight cabin attendants, that no such policy has ever been enforced against any male employees, and that the policy has only been applied to female flight cabin attendants (App. 22-23).

Action by the EEOC.

After her discharge Mrs. Sprogis filed a timely charge with the Equal Employment Opportunity Commission (EEOC) asserting that United had discriminated against her because of her sex (App. 15-17). On August 30, 1968, the EEOC issued a decision finding that there was "reasonable cause to believe that the Company had violated Title VII of the Civil Rights Act of 1964 by maintaining the policy of terminating female flight cabin attendants as a result of marriage and by terminating [Mrs. Sprogis] pursuant to said policy." (App. 18-19.)

Mrs. Sprogis later received a notice from the EEOC, dated October 31, 1968, that she could within thirty days institute a civil action in the appropriate federal district court (App. 20). The complaint in the present case was filed on November 27, 1968 (App. 8-11). United's initial answer admitted the essential factual allegations of the

2. Reference to the Joint Appendix filed by Petitioner with the Clerk of the Court shall be "App. ...."

complaint (except allegations describing exhaustion of administrative remedies, to which United pleaded lack of information sufficient to form a belief), but denied violation of the Act. Thereafter, United filed an amended answer adding an assertion that, in continuing its policy of discharging stewardesses upon marriage, it acted in good faith reliance upon an opinion of the EEOC and that it should consequently be relieved of liability under Section 713(b) of the Act (App. 21-23).

Motions for Summary Judgment.

Respondent then filed a motion for summary judgment, and, since United had admitted all essential factual allegations of the complaint except those concerning exhaustion of administrative remedies, set forth in an affidavit the facts showing such exhaustion (App. 14-20). In response, United filed a motion for summary judgment in its own behalf asserting (a) that United acted in good faith reliance on an opinion of the EEOC, and (b) that United's policy of requiring female cabin attendants to remain unmarried distinguished between persons of the same sex on the basis of marriage rather than between persons of different sexes.

In support of its motion for summary judgment United attached an affidavit of John R. Hill, its labor counsel, relating to the Section 713(b) defense (App. 25-40), and an affidavit of John Courtright, then United's Director of In-Flight Services Planning, relating to the requirements of the stewardess job, the origin of the no-marriage rule, and other contentions of United (App. 58-71). To the affidavit of Mr. Hill, United attached a copy of a memorandum which Mr. Hill had prepared on November 22, 1965 and which his affidavit asserts the appropriate official in United relied on in making the decision on November

23, 1965, to continue the Company's no-marriage policy, Title VII notwithstanding (App. 41-53).

At the time he submitted his memorandum, Mr. Hill had seen the following statement of the EEOC's views:

> An employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a prohibited discrimination based on sex. It is irrelevant that the rule is not directed against all females, but only married ones, for so long as sex is a factor in the application of the rule, it is a discrimination based on sex. Under certain circumstances, such a rule may be justified as based on a bona fide occupational qualification within the meaning of Section 703(e)(1). However, in order to be a bona fide occupational qualification, the qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle, such as the desirability of spreading work (App. 45).

Mr. Hill was also aware of what he calls an opinion of the General Counsel of the EEOC, dated September 22, 1965 and printed in Commerce Clearing House's *Employment Practices Guide*, which stated in substance that the above ruling should not be applied to airline stewardesses "until the Commission decides whether sex is a bona fide occupational qualification for the job of air-line stewardess." (App. 46).

On March 25, 1966, Northwest Airlines formally requested a written opinion from the EEOC that female sex was a BFOQ for the position of flight cabin attendant. United, other airlines, and the Air Transport Association joined in this request (App. 30-33). The Commission suspended the processing of charges alleging sex discrimination in the employment of flight cabin attendants pending the BFOQ determination. Following hearings by the Commission, and delays caused by litigation initiated

by the Air Transport Association, the Commission decided on February 24, 1968, that sex was *not* a bona fide occupational qualification for the position of flight cabin attendant (33 Fed. Reg. 3361).

On June 20, 1968, the EEOC issued two individual decisions holding that marital restrictions applicable to the stewardess position violated Title VII. *Neal* v. *American Airlines, Inc.*, 1 CCH Employment Practices Guide ¶ 6002 (EEOC, 1968); *Colvin* v. *Piedmont Aviation, Inc.*, 1 CCH Employment Practices Guide ¶ 6003 (EEOC, 1968). The Commission issued its decision in Respondent's case on August 30, 1968, concluding, as noted above, that there was reasonable cause to believe that United had violated Title VII in discharging the Respondent because of her marriage.

The District Court Decree.

On January 21, 1970 the District Court entered Findings of Fact and Conclusions of Law in this case, holding that United's no-marriage rule violated Title VII, and that the matters asserted by United as defenses were not sufficient to show that sex or single status is a bona fide occupational qualification for the position of airline stewardess or that the Company acted in reliance upon a written opinion of the EEOC within the meaning of Section 713(b). There being no dispute as to any material fact, the Court held the Respondent was entitled to summary judgment and denied United's motion for similar relief. The Court further concluded that it would retain jurisdiction for the purpose of determining the amount of back pay due to Mrs. Sprogis, and for consideration of whether the scope of relief should be extended to other former United stewardesses who had been discharged under the Company's rule because of marriage (D. C., pp. A3-A7). The District

Court entered a decree in accordance with its Findings and Conclusions (D. C., pp. A8-A11). Further proceedings were stayed while United perfected an interlocutory appeal pursuant to 28 U. S. C. § 1292(b).

The Decision of the Court of Appeals.

The Court of Appeals for the Seventh Circuit affirmed the District Court's decree and remanded the case for further proceedings, Judge Stevens dissenting. The majority opinion held that United's application of the marital status rule to stewardesses without applying it to any male employees, including male flight cabin attendants, violated Section 703(a)(1) of the Act (C. A., pp. A15-A17).

The Court also held that United's rule that female cabin attendants must be unmarried, under pain of discharge, could not be justified as a "bona fide occupational qualification" under Section 703(e)(1). United's inability to offer any "salient rationale in support of its marital status policy" justified the District Court's grant of summary judgment for Mrs. Sprogis (C. A., pp. A17-A19).

As to United's Section 713(b) defense of good faith reliance, the Court ruled that the EEOC release which Mr. Hill allegedly relied upon was legally insufficient both as to form and content (C. A., pp. A19-A22). The form of the letter, as revealed before the District Court, failed in several substantial respects, including lack of the label "opinion letter", letterhead, and name of the addressee, to comply with published Commission regulations defining the basis of a proper reliance defense under Section 713(b).

Moreover, the Court ruled that the content of the EEOC statement did not approve no-marriage rules and therefore could not serve as a defense of United's actions.

As to United's argument that it did not specifically intend to commit a violation of the Act, the Court ruled that

"intentionally", as used in Section 706(g) of the Act, meant deliberately, as opposed to accidentally, following a policy judged to be discriminatory (C. A., p. A22).

Finally, the Court held that the District Court had the equitable power under Section 706(g) of the Act to at least hear evidence and legal arguments as to whether it would be possible and appropriate to extend relief to other stewardesses similarly discharged by United. The Court specifically refrained from prematurely expressing any opinion on the ultimate issue to be reached upon remand (C. A., pp. A22-A24).

ARGUMENT.

I.

THE FINDING OF AN UNJUSTIFIED VIOLATION OF SECTION 703(a)(1) ACCORDS WITH PHILLIPS v. MARTIN MARIETTA CORP.

Contrary to the suggestion of Petitioner, the Court of Appeals' application of Sections 703(a)(1) and 703(e)(1) of the Civil Rights Act of 1964 accords with the language of the Act, Congressional intent, this Court's opinion in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971), and the opinions of other circuits.

Phillips v. *Martin Marietta Corp., supra,* resolved incipient conflict among the federal courts as to the legal validity of employers' rules applied only to one sex. The company in that case rejected female job applicants with pre-school age children, while employing men similarly situated. The Supreme Court ruled that the imposition of restrictive hiring qualifications only on women constituted sexual discrimination in violation of § 703(a) of the Civil Rights Act:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children. 400 U. S. 542, 544 (1971).

The facts of the present case present a similarly discriminatory application of a hiring rule. United hires both male and female flight personnel, yet it applies a prohibition against marriage only to female flight personnel.

The Court of Appeals correctly held that, as in *Phillips,* the imposition of this policy on only female flight personnel constituted discrimination on the basis of sex and was prohibited by § 703(a)(1) of the Act.

The Court correctly rejected United's contention that stewardesses constitute a distinct employment classification with unique duties. By confining its analysis to this limited group, United argues that it nondiscriminatorily applied the marriage prohibition to a group of employees who merely happened to be all of the same sex. The Court refused to avoid the essential discriminatory fact that United prohibited female flight personnel from marrying, without applying that same prohibition to any male employees: "Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position" (C. A., p. A17).

Moreover, the facts plainly contradict United's contention that stewardesses constitute such a sufficiently unique and sexually homogeneous classification. By its own admission, United employs 116 male stewards on its Hawaii flights (App., 67-70). According to United's job descriptions and the affidavits of its officers, the requirements and duties of stewards and stewardesses differ only in dress, residence, a knowledge of Hawaiian culture, and the occasional lifting of heavy objects. In all other respects the stewards and stewardesses provide the same in-flight services to passengers. Minimal distinctions in job function cannot justify discriminatory treatment. *Schultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 265 (3rd Cir. 1970), *cert. denied,* 398 U. S. 905 (1970); *Schultz* v. *American Can Co.*, 424 F. 2d 356, 360 (8th Cir. 1970). The actual employment of male stewards serving essentially the same functions as stewardesses makes factually inaccurate United's contention that "stewardess" is a unique occupational grouping.

United argues that even if their marital status policy violated § 703(a)(1) of the Act, it was excused as a "bona fide occupational qualification" (BFOQ) under § 703(e)(1). United contends that judicial inquiry must first be made into female sex itself as a BFOQ, rather than the specific discriminatory policy in question. Accordingly, it argues that summary judgment on the issue of sex as a BFOQ was unjustified. Such an argument was rejected by both the majority and minority[3] in the Court of Appeals and is in conflict with the Supreme Court holding in *Phillips*.[4] In the words of the Court of Appeals below, "United's no-marriage rule must stand upon its own feet." (C. A., p. A18.) United was correctly required to show why stewardesses are no longer occupationally qualified after marriage.

In its affidavits introduced pursuant to the cross-motions for summary judgment, United offered only two possible justifications for its marital status policy. Mr. John Courtright, Director of In-Flight Services Planning for United, stated in his affidavit that United felt that the irregular hours of a stewardess were "in conflict with the woman's role in married life," and that married women's greater likelihood of intentionally concealing pregnancies would be "a potential source of embarrassment to the Company" (App. 64-65).

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3. "As a matter of statutory construction, the Commission's analysis of the relationship between plaintiff's prima facie case and the BFOQ defense [that is, that a no-marriage rule is sexually non-discriminatory under § 703(a)(1) if applied to a class of employees who are legally sexually homogeneous under § 703(e)(1)] is untenable. The scope of the defense is not coextensive with the coverage of § 703(a)(1)" (Judge Stevens, C. A., pp. A27-A28).

4. "The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." 400 U. S. 542, 544 (1971).

Past judicial decisions, the Commission's own regulations, and the relevant legislative history all recognize that the BFOQ exception must be narrowly construed.[5] More particularly, as Justice Marshall stated in *Phillips*, the Act's prohibition of sexual discrimination in employment was intended "to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes'. . . . Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity." 400 U. S. 542, 545 (1971).

Blanket discriminatory prohibitions, of which United's policy and its justifications stand as a quintessential model, must be replaced by regulations specifically addressed to the legitimate problems anticipated by the employer. The burden of establishing a § 703(e)(1) defense falls upon the party asserting it. *Weeks* v. *Southern Bell Telephone Co.*, 408 F. 2d 228, 234-235 (5th Cir. 1969). United's total inability to allege any legally sufficient rationale for its marital status policy justified the District Court in granting summary judgment for Mrs. Sprogis. See 6 MOORE, FEDERAL PRACTICE ¶ 56.17[4], at 2941 (2d ed. 1965).

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5. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 715-718 (7th Cir. 1969); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228, 232 (5th Cir. 1969); 29 C. F. R. § 1604.1(a); H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963); Clark-Case Interpretative Memorandum of Title VII of H. R. 7152, 110 *Cong. Rec.* 7213 (1964).

II.

THE UNDISPUTED EVIDENCE BEFORE THE DISTRICT COURT AS TO UNITED'S ALLEGED DEFENSES FULLY WARRANTED THE GRANT OF SUMMARY JUDGMENT FOR MRS. SPROGIS.

A.

The Defense of Good Faith Reliance Under Section 713(b).

Petitioner's alleged Section 713(b) good faith reliance defense centers around United's decision in November, 1965, to continue its policy of discharging stewardesses upon marriage. Mr. Mason, Vice President of United, made the Company's decision to continue the policy on the basis of a memorandum submitted by Mr. Hill (App. 29, 41). In preparing his memorandum, Mr. Hill asserted that he relied on what he refers to as an opinion of the General Counsel of the EEOC, Mr. Duncan, dated September 22, 1965 (App. 29). The full text of what Mr. Hill terms an opinion, as it was known to him when he made his recommendation to United on November 22, 1965, is as follows (App. 46):

> Until the Commission decides whether sex is a bona fide occupational qualification for the job of air-line stewardess, the Commission ruling that a company rule or collective bargaining agreement provision which requires female employees to resign upon becoming married (absent a similar rule or provision for male employees) should not be applied to airline stewardesses.

Professor Moore has described when summary judgment is warranted in the face of affirmative defenses:

> Where the defendant's defenses are limited to one or more affirmative defenses and there is no triable issue of fact as to *any* of the affirmative defenses, or they are all legally insufficient, then the case is ripe for summary adjudication in accordance with applicable prin-

ciples of substantive law. 6 MOORE, FEDERAL PRACTICE ¶ 56.17[4], at 2491 (2d ed. 1965).

The District Court granted summary judgment for Respondent on the basis of the uncontested evidence before the Court. The Court of Appeals affirmed on that same basis. United's alleged defense of good faith reliance failed because the statement of the Commission's General Counsel on which it was based was legally insufficient in both form and content.

1. The EEOC Letter Did Not Meet the Requirements of Section 713(b).

The Equal Employment Opportunity Commission has, by regulation published in the Federal Register prior to the effective date of Title VII, authoritatively interpreted Section 713(b). The interpretation placed by the administering agency on the statute it administers is to be given great weight. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433 (1971); *Udall* v. *Tallmann*, 380 U. S. 1 (1965). The Commission has defined the operative phrase of Section 713(b)—"written interpretation or opinion of the Commission"—as:

> Only (a) a letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission or (b) matter published and so designated in the *Federal Register*. 29 C. F. R. § 1601.30.

These requirements were expressly approved in *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir. 1969), *cert. denied*, 397 U. S. 919 (1970). The defendant in *Local 189* had received a letter of support directly from Mr. Edelsberg, Executive Director of the Commission, and an oral statement from Mr. Roosevelt, the Chairman of the Commission. The court held that the letter and oral statement did not meet the requirements for a § 713(b) reliance defense.

> They appeared neither as portions of the Federal Register *or as designated "opinion letters"* over the signature of the General Counsel. . . . Mr. Edelsberg was not General Counsel, *nor did his letter bear the "opinion letter" label.* 416 F. 2d 980, 997. (Emphasis added.)

The Court recognized that the Commission's narrow definition had a legitimate purpose. "A broader reading might bind the Commission to informal or unapproved opinions volunteered by members of its staff." 416 F. 2d at 997.

Every element of formal insufficiency of the Duncan letter of September 22, 1965, was before the District Court: (1) The letter was never published in the Federal Register, (2) The letter was not designated "Opinion Letter"; (3) The General Counsel blocked out the Commission letterhead before the letter was sent; (4) The letter was sent to a party other than United; (5) The General Counsel carefully indicated that the opinions expressed were his own views and not those of the Commission.

This record required a District Court finding that the Duncan letter could not support a defense of good faith reliance under Section 713(b). The Court of Appeals opinion makes clear that its decision was based on the same indicia of non-formality that were before the District Court. The Court did not rely on the fact that the letter was merely an internal agency memorandum (as the court in *Local 181* had accurately anticipated), as the Petitioner suggests, but related this fact simply as an explanation for the proven non-formality which rendered the letter legally meaningless.

> United does not contend that it relied upon anything published in the Federal Register by the Commission. Instead United relies upon a so-called "letter of opinion" of the Commission's General Counsel as to the applicability to the airline industry of the Commission's ruling on discrimination against married women. Nothing in United's affidavit, however, supports the

claim that this document was in fact an "opinion letter" issued on proper request pursuant to applicable agency procedures. See 29 CFR §§ 1601.29, 1601.30. *Significantly, the document referred to in United's affidavit lacked the letterhead of the Commission and did not reveal the addressee. There is no indication that the General Counsel's letter was "entitled 'opinion letter' " or signed by the General Counsel on behalf of the Commission as required by the interpretive regulation.* Moreover, the representations of the Commission itself, before this Court as *amicus curiae*, disclose that the purported "letter of opinion" was instead a September 22, 1965, internal agency memorandum from the General Counsel to the Director of Compliance with respect to the latter's handling of inquiries he received. (C. A., pp. A20-A21.) (Emphasis added.)

2. The EEOC Letter Did Not Rule on the No-Marriage Policy.

In addition to the faulty form of the Duncan letter, its content gave United no reason to believe that discharges of stewardesses upon marriage were permitted by the Act or that discharges effected prior to the Commission's BFOQ determination would not be ruled unlawful. The Court of Appeals correctly held that,

> Apart from the formal insufficiencies apparent from United's affidavit, the content of the September 22, 1965, Commission memorandum itself also fails to support a claim of good faith reliance upon an official opinion letter. The memorandum merely states that definitive judgment of the legality of no-marriage rules must be suspended pending further determination by the Commission of possible Section 703(e)(1) exemptions. The only "opinion" expressed was that the circumstances existing at that time prevented an unequivocal ruling that the guideline on discrimination against married women invalidated airlines' no-marriage rules for stewardesses. The memorandum does not indicate a considered legal judgment approving the policy under the Act. (C. A., p. A21.)

The version of the Duncan letter upon which Mr. Hill relied stated only that the Commission's previous ruling that a no-marriage policy is unlawful "should not be applied" to airline stewardesses "until" the Commission decided whether sex was a bona fide occupational qualification for the job.

All that this language can reasonably be construed to mean was that the Commission was delaying making determinations of the legality of stewardess discharges and the processing of charges until it decided whether sex was a BFOQ for the stewardess position. Mr. Hill's memorandum and Mr. Mason's letter to a stewardess in 1965 both indicate that they realized the true import of the General Counsel's statement (App. 32, 54-55).

The statement of the General Counsel (a) failed to meet the formal requirements for an opinion letter under Section 713(b), and (b) offered no grounds for United to believe that its discharge of stewardesses upon marriage was lawful. Both lower courts correctly concluded that the statement of the General Counsel was insufficient as a matter of law to support United's claim of a Section 713(b) good faith reliance defense. Accordingly, the grant of summary judgment for Mrs. Sprogis was fully justified.

B.

Intentional Violation Under Section 706(g).

Section 706(g) of the Act authorizes affirmative relief, "[i]f the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice." United argues that "intentionally" means a specific intent to violate the statute, rather than an intent to engage in the practice proved discriminatory. Such an argument misreads the clear words of the statute, contradicts legislative history, and is in opposition to holdings of this Court

and lower courts. Limiting relief to the rare case where the defendant actually intended to violate the law would completely vitiate Title VII.

In *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, 996 (1969), the Court of Appeals for the Fifth Circuit observed.

> Section 706(g) limits injunctive (as opposed to declaratory) relief to cases in which the employer or union has "*intentionally engaged in*" an unlawful employment practice. Again, the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental. The relevant legislative history, quoted in the margin, bears out the language of the statute on that point.

See also *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970), *cert. denied*, 401 U. S. 954 (1971).

Senator Dirksen, commenting on an earlier version of the bill which used the synonym "willfully",[6] stated:

> The words "willful and willfully" as ordinarily employed, mean nothing more than that the person, of whose actions or default the expressions are used, knows what he is doing, intends what he is doing, and is a free agent. . . . The terms are also employed to denote an intentional act . . . as distinguished from an accidental act. 110 Cong. Rec. 8194 (1964).

On the pleadings, affidavits and exhibits the District Court found that United had "a deliberate policy" of terminating and reassigning female flight employees when they married. This finding justified an order for affirmative relief under § 706(g).

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6. Although it is unclear why the final draft substituted "intentionally" for "willfully", commentators agree that the effect of this substitution, if any, was to make the statute even less limited. *Local 189*, 416 F. 2d at 996.

III.

THE LACK OF EVIDENCE AND ARGUMENT ON THE CLASS RELIEF ISSUE AND THE POSSIBILITY OF MOOTNESS REQUIRE A DENIAL OF CERTIORARI AT THIS TIME.

The District Court found that United discharged Respondent pursuant to "a deliberate discriminatory policy," and that "it appears probable that other female employees of Defendant were discharged under circumstances in all significant respects identical to those under which Plaintiff was discharged." (D. C., p. A7). Accordingly, the Court retained jurisidiction to determine "whether the scope of the relief herein ordered should be made applicable to other Stewardesses discharged by Defendant pursuant to the policy herein determined to be illegal as in violation of Title VII of the Civil Rights Act of 1964." (D. C., p. A7). Further proceedings were stayed while United perfected an interlocutory appeal.

In remanding the case to the District Court for further proceedings, the Court of Appeals specifically refrained from ruling on the ultimate validity of any extension of relief. It merely allowed the court to proceed to hear arguments and evidence, "including references to the safeguards of Rule 23", as to whether relief should be applied to other stewardesses.

In this case's present posture, the District Court has not yet heard either evidence or argument as to the necessity or wisdom extending relief to other stewardesses similarly discriminated against. Upon remand, the District Court will hear such argument and reach its decision concerning the extension of relief. If the District Court ultimately decides to extend the scope of relief, United will, of course, have the right to appeal that final decision and, if necessary, again petition this Court for certiorari. On the other hand, if relief is limited to Mrs. Sprogis, then the

issue will be mooted.[7] Accordingly, Respondent submits that the lack of even a preliminary determination in this case that relief should be extended warrants this Court to refuse to issue a writ of certiorari at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. R.*, 389 U. S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *United States*, 240 U. S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 384 (1893).

In addition to the possibility of involving the Court with an unnecessary issue, a grant of certiorari at the present time would present the Court with an issue involving complex arguments not yet fully framed in the lower courts. In accordance with Title VII's momentous goal of abolishing deeply rooted patterns of discrimination in employment, Congress has granted the federal courts full equitable powers to "order such affirmative relief as may be appropriate." Section 706(g). United argues that despite this broad grant of power, recognized in Courts of Appeals' decisions that class relief can be granted to persons who do not file charges with the EEOC nor join as named plaintiffs in the lawsuit,[8] such relief can be granted only in suits brought under the provisions of Rule 23.

However, Congress by statute has indicated its policy that limiting provisions of the Federal Rules of Civil Procedure should be liberally construed in accordance with principles of common law in cases where rigorous enforcement of the Rules would result in the impairment

7. In addition, *Romanzanta, et al.* v. *United Air Lines* (N. D. Ill., No. 70-C-1157), a class action suit brought against Petitioner on the same theory of recovery as the present case, is now in the pre-trial stage before Judge Perry in the United States District Court for the Northern District of Illinois.

8. *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968).

of federal civil rights statutes. 42 U. S. C. § 1988. *Brown* v. *City of Meridian*, 356 F. 2d 602 (5th Cir. 1966); *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir. 1964).

Title VII actions filed by individuals in opposition to discriminatory employment practices particularly require a liberal interpretation of the rules governing broad-based relief in order to effectuate the principles and purposes of the legislation The courts have recognized that Title VII suits are inherently class actions, in that prohibited discrimination by definition means actions taken against a class of individuals, as a class, whether for reasons of race, religion or sex. The Fifth Circuit in *Jenkins* v. *United Gas Corporation*, 400 F. 2d 28, 33 (1968), stated in its discussion of the issue of mootness of the *individual's* suit, "Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated."

The Seventh Circuit in *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711, 719 (1969), also recognized that the class-quality of a suit under Title VII arises from the very nature of the evil that is being attacked:

> A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.*, race, sex, religion or national origin.

Moreover, it is difficult to see how United would be prejudiced by the action of the District Court, or subjected to any greater liability or expense than if the suit had been filed initially as a class action following the provisions of Rule 23. United will ultimately be forced to defend itself on the class aspects of its no-marriage policy at some future time. Under the procedures adopted by the District Court in its decree, all of the Rule 23 safeguards, including court determination of the composition of the class and other procedural matters, can be considered by the District Court at United's suggestion.

In short, it is not an abuse of the District Court's equitable powers to hear evidence as to the possibility of other individuals having been similarly discriminated against by United's no-marriage rule and to consider arguments, including the above arguments, as to the correctness of extending relief to those individuals. Cf. *Rosen* v. *Public Service Electric and Gas Co.*, 409 F. 2d 775, 780, n. 19 (3rd Cir. 1969).

More importantly, remand of this case by the Court of Appeals to the District Court following United's interlocutory appeal will allow the development of evidence and argument on this issue which would better enable the Supreme Court to decide the issue on a later appeal, if that should prove necessary.

CONCLUSION.

For the foregoing reasons, it is respectively submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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